Supreme Court, U.S.
FILED

00 935 DEC - 7 2000

OFFICE OF THE CLERK

No. 00- _____

IN THE

Supreme Court of the United States

MICHAEL CONTE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

FRED HADDAD
HADDAD & HESTER, P.A.
One Financial Plaza
Suite 2612
Fort Lauderdale, Florida 33394
(954) 467-6767

Attorney for Petitioner

Balmar Legal Publishing Services, Washington, DC 202-682-9800

8099

QUESTION PRESENTED FOR REVIEW

WHETHER THE APPELLATE COURT ERRED IN NOT REVERSING THE TRIAL COURT'S DECISION TO EMPLOY THE ACQUITTAL OF A SUBSTANTIVE CHARGE OF POSSESSION OF A BANNED ASSAULT RIFLE TO INCREASE PETITIONER'S SENTENCE IN SPITE OF THIS COURT'S DECISIONS IN *CASTILLO V. UNITED STATES*, __ U.S. __ 120 S.CT. 2090 (2000) AND *APPRENDI V. NEW JERSEY*, __U.S.__ 120 S.Ct. 2348 (2000)

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
OPINION BELOW 1
JURISDICTIONAL STATEMENT 1
CONSTITUTIONAL PROVISIONS INVOKED 2
AMENDMENT V 2
AMENDMENT VI 2
STATEMENT OF THE CASE 2
STATEMENT OF THE FACTS 5
REASONS FOR GRANTING THE WRIT 11
CONCLUSION 16

TABLE OF AUTHORITIES

Cases **Page(s)**

Almendarez-Torres v. United States, 523 U.S. 224 (1998) 12

Apprendi v. New Jersey, __ U.S. __ 120 S.CT. 2348 (2000) 5,11,12,15

Castillo v. United States, __ U.S. __ 120 S.CT. 2090 (2000) 5,11,12,13,15

Jones v. United States, 526 U.S. 227 (1999) 12,13

United States v. Barakat, 130 F.3d 1448, 1452 (11th Cir. 1997) 11

United States v. Jameison, 202 F.3d 1293 (11th Cir. 2000) 11

United States v. Pedro, 999 F.2d 497 (11th Cir. 1993) 9,10

United States v. Putra, __ U.S. __ 117 S.CT. 633 (1997) 10

U.S. v. Spinner, 152 F.3d 950 (D.C. Cir. 1998) 9

United States v. Watts, __ U.S. __ 117 S.Ct. 633 (1997) 10

No. 00- ____

IN THE

Supreme Court of the United States

MICHAEL CONTE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

OPINION BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit in this matter is an unpublished opinion under the following caption: *United States v. Conte*, Case No. 99-14306DD, and is contained in the appendix as A.1. Petition for Rehearing or Rehearing En Banc [A.2] was denied on 14 September 2000 [A.3].

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Eleventh Circuit was rendered on 21 July 2000 and Rehearing was denied on 14 September 2000. This Petition is within 90 days thereof [Supreme Court Rule 13]. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOKED
AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed...."

STATEMENT OF THE CASE

Petitioner was initially indicted by a Grand Jury sitting in the Southern District of Florida and charged in one count sounding in "possession of a firearm by a convicted felon". That Indictment was later superseded and was expanded to include five counts [A.4], which alleged as follows:

1. Count One:

On or about September 22, 1998, in Broward County, in the Southern District of Florida, the defendant,

MICHAEL A. CONTE,

having previously been convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess one or more

> firearms in and affecting commerce, to wit: a Smith & Wesson .44 Magnum caliber revolver; a Colt .45 caliber pistol; a Smith & Wesson .38 caliber revolver; two (2) Colt MKIV Series 80 .45 caliber pistols; a Beretta .25 caliber pistol; a Mossberg 12 gauge shotgun with pistol grip, and an Arsenal Model SLR-95 7.62 x 39 caliber semiautomatic rife.
>
> All in violation of Title 18, United States Code, Sections 922(g)(1) and 924(a)(2)
>
> [Emphasis Supplied].

The Indictment did not, in this Count, allege that this Arsenal SLR-95 [AK-47] was a condemned assault weapon under Section 922(v) or 921(a)(30)B, only that Mr. Conte possessed, as a convicted felon, a SLR-95 semiautomatic rifle.

2. Count Two, in short form, charged possession of ammunition by a convicted felon.

3. Count Three:

On or about September 22, 1998, in Broward County, in the Southern District of Florida, the defendant,

MICHAEL CONTE,

> did knowingly possess a semiautomatic assault weapon as defined under Title 18, United States Code, Section 921(a)(30)(B), that is, an Arsenal SLR-95 7.62 x 39 mm semiautomatic rifle, serial number KO 37 1494, equipped with a folding shoulder stock, detachable magazine, and pistol grip that protrudes conspicuously beneath the action of the weapon.
>
> In violation of Title 18, United States Code, Sections 922(v) and 924(a)(1)(B).

Thus, the Government was alleging possession of the Arsenal SLR-95 (AK-47) weapon a second time, this time as

a semiautomatic configured as an assault rifle, under Title 18 §922(v) and 924(a)(1)(B) which, upon conviction, materially affects sentencing under the guidelines, as does, of course, the number of weapons possessed.

4. Count Four charged possession of a controlled substance with intent to distribute, for which the Petitioner was acquitted.

5. Court Five alleged possession of a controlled substance and also resulted in an acquittal.

Petitioner filed Motions to Suppress Evidence and Supplements thereto and the Government also replied in opposition. These were denied.

Trial was had, and as to Count One, an interrogatory verdict was sought by Petitioner and in fact was submitted to the jury for each weapon alleged so that the jury could determine whether the Government met its burden of proof.

The jury then returned its verdict finding Appellant guilty as charged of Count One but as to only two certain weapons of the eight alleged, which, of course is still a guilty verdict for purposes of the statute; guilty as to Count Two; and not guilty of the remaining three counts, including possession of the semiautomatic assault weapon [AK-47] as alleged in Count Three. A Presentence Investigation Report was ordered [A.6].

The Petitioner thereafter filed his Renewed Motion for Judgment of Acquittal or New Trial, which the trial Judge denied.

The Petitioner filed his initial Objections to the Presentence Report [A.8] and the Government likewise objected, seeking an increase for "obstruction of justice".

The Petitioner also moved for a downward departure. The Petitioner was sentenced to, in essence, sixty three (63) months incarceration, followed by supervised release and ordered to pay a fifteen thousand ($15,000) dollar fine. This

came after the Court overruled the defense sentencing objections as will be described infra, granted the Government's objections and departed upward, but then granted a downward departure upon the defense motion.

Timely Notice of Appeal followed, and the matter went before the United States Court of Appeals for the Eleventh Circuit. Prior to decision the Petitioner advised the Eleventh Circuit by Notice of Additional Authority of this Court's decision in *Castillo v. United States,* __ U.S. __ 120 S.Ct. 2090 (2000) which, it is submitted, was particularly on point [A.5]. Although requested, oral argument was not had. After decision, the Petitioner, in seeking Rehearing or Rehearing En Banc brought before the Court, again, notice of the decision in *Castillo, Supra,* and *Apprendi v. New Jersey,* __ U.S. __ 120 S.Ct. 2348 (2000). Rehearing was denied, and thus the sentence was upheld.

STATEMENT OF FACTS

On 22 September 1998, a search warrant issued under the hand and seal of Broward County, Florida, Circuit Judge James I. Cohn, authorizing the search of a residence located at 10635 Northwest 47 Court in Coral Springs, Florida, the home of the Petitioner, his wife, and various others. That residence is within a private community known as the "Classics at Kensington Two".

The warrant that issued to this home was served, inter alia, by Broward Sheriff's Deputy Arthur J. Barnhouse. What occurred prior to that is that Federal Alcohol Tobacco and Firearms Agent [hereinafter sometimes for brevity ATF) McKean had received confidential information that Mr. Conte was observed carrying an AK-47 (enclosed in a case) into his residence, and appeared wealthy with no job.

This was in early June 1998. Barnhouse, a narcotics detective assigned to a multi-agency task force with Agent McKean, surveilled the residence with McKean as it was learned that the Petitioner lived in a very expensive home, had

expensive cars [i.e. two Lincolns and a Corvette] and did not appear to work.

Mr. Conte is a "motorcycle" type person with long hair, tattoos, chains, and motorcycles, so coupled with the expensive cars and home, twenty (20) year drug agent Barnhouse suspected he was involved in drugs.

There was no corroboration that Conte ever bought an AK-47 or possessed one, and checks that were made with the person that supposedly sold the weapon to Mr. Conte proved negative. At some point the police learned Mr. Conte was a convicted felon who had had his civil rights restored, save to own or possess a firearm.

Surveillance was again conducted at the home, but no financial analysis, running of tags, bank information or the like was sought, nor was any attempt made to determine how Conte acquired his wealth. Surveillance started in July 1998 although a search warrant was not obtained until 22 September, after three garbage pulls were made. No other investigation was done.

The garbage pulls were undertaken due to the appearance of wealth, and the police did not try to determine if the wealth were legitimate; it later became known Petitioner had won several million dollars in the New York lottery a year or two earlier.

Based upon these garbage pulls and the marijuana "roaches" found, the search warrant issued, and the warrant was then executed by Barnhouse and McKean.

A number of weapons were in fact found within several areas of the house, as is obvious by the indictment. Marijuana was also found.

Among the various weapons found was a "post-ban" AK-47 that had been modified to constitute an "assault weapon".

Several defense witnesses testified as to the weapons.

Mr. Omar Herring testified he owned a matching pair of Colt 45 pistols found in the house and several other weapons also alleged in Count One and had borrowed money from Mrs. Conte and put the weapons as collateral.

Scott Diamond, a roomer at the Conte residence, testified he too had borrowed money from Mrs. Conte and gave her weapons as collateral; he further testified he owned some of the weapons found in the residence and alleged in Count One, as well as the AK-47, which was purchased at a gun show along with a second AK-47 type weapon, although Diamond was unable to state from which country they came, as they are made in several countries, nor could he tell what model the weapon was.

Mrs. Conte testified as to weapons also, one, the "lady Smith" being hers, and stated that the marijuana, which she used daily due to her active AIDS condition, was in fact hers to alleviate the effects of her medicine and pains.

The jury, after receiving the "Allen" charge, over objection of the Petitioner, as well as somewhat modified Allen charge due to questions, and in response to, inter alia, an interrogatory verdict, returned the following:

> a. As to Count One the jury found the Defendant on the charge of being a person having been previously convicted of a crime punishable by a term of imprisonment of one year or more - guilty of possession of firearms, in particular as to the Smith and Wesson point 44 Magnum; and the Colt 45 caliber pistol; not guilty as to the Smith and Wesson 38 and not guilty as to the two Colt MK IV series 80 45 caliber pistols, and no verdict as to the remainder including the Arsenal 95 semiautomatic rifle. [Emphasis supplied].
>
> b. Guilty of possessing ammunition.
>
> c. As to the charge of possessing the Arsenal 95 [AK-7] semiautomatic as an assault rifle, not guilty

> [Emphasis supplied]. This is the same weapon charged as a semiautomatic rifle in Count One.

The Petitioner was acquitted of the drug charges, and the matter was set for sentencing.

Having requested an interrogatory verdict for, ultimately, sentencing purposes as to Count One, and more particularly the assault weapon allegation which greatly enhances a sentence, the finding of not guilty on Count Three, the AK-47 assault weapon and the no verdict on the AK-47 even as a non assault weapon as well as "holding" Petitioner criminally liable for only two of the weapons alleged, resulted in a major part of the sentencing hearing being directed to that issue and it was a central issue that was presented to the Eleventh Circuit both on appeal and on Petition for Rehearing.

The Presentence Report [hereinafter for brevity PSR, A.6], as to Offense Level Computation recited as follows:

> **Base Offense Level:** The guideline for 18 U.S.C. §922(g)(1) and 924(a)(4) is found in §2K2.1. That section provides that an offense involving unlawful receipt, possession or transportation of firearms or ammunition; prohibited transactions involving firearms or ammunition has a base offense level of 22 if the offense involved a firearm described in 26 U.S.C. §5845(a) or 18 U.S.C. §921(1)(30) and the defendant had one prior conviction of either a crime of violence or a controlled substance. The instant offense involved an Ak-47, with folding stock and pistol grip, which is in violation of 18 U.S.C. §921(a)(30). The defendant was previously convicted of Robbery 1st Degree in the Supreme Court in Queens, New York, Indictment #2093-79.

The PSR preparer then, recommended that the Petitioner be sentenced for the charges in Count 3, the acquitted assault weapon configured AK-47 and the unresolved AK-47 just charged as a semi automatic weapon not alleged to be an

assault weapon as part of Count One. This then set the base offense level at 22 as opposed to Level 14.

The PSR continued:

> **Specific Offense Characteristics:** Pursuant to §2K2.1(b)(1)(c), if the offense involved eight to 12 firearms, increase by three levels[1].

In this aspect, then, the Government was attributing to the Petitioner all the weapons charged in the Indictment, regardless of verdict, as a total of eight weapons were found, including the wife's lady Smith.

The Petitioner then made his Initial Objections to the Report which recited as follows:

> The Defendant objects to the base offense level of paragraph 16, that is level 22. The Defendant submits he was acquitted of the "AK-47" possession as an assault weapon; another person testified he owned it and put it in the Defendant's house and there was no evidence to suggest the Defendant was aware it was an assault weapon [compare for both issues, *United States v. Pedro*, 999 F.2d 497 (11 Cir. 1993)]. [Emphasis supplied].
>
> [See also *U.S. v. Spinner*, 152 F.3d 950 (D.C. Cir. 1998)]
>
> Further, the jury, while convicting the Defendant of possession certain weapons, did not, on its interrogatory verdict, even find that the Defendant possessed a "non-barred AK-47", thus the level 22 should not apply. The proper base offense level should be level 14.

---

[1] The Presentence Report erroneously assessed two points for the amount of weapons, but was corrected to three over objection at sentencing.

The objections continued:

> The Defendant objects to the two point [later 3] increase under §2K2.1(b)(1)(c) in paragraph 17. Exactly eight firearms were seized. It is uncontroverted that the .38 Smith and Wesson belonged to Mrs. Conte, a person who is fully able to own and possess a firearm, and testified it was her gun. Hence, not even a constructive possession theory applies, *Pedro*, *supra*.
>
> The two matching Gold Cup Colt MK IV pistols were also the property of someone else [Omar] who had them at the Defendant's home; he too lived there on occasion, and at the time of the search and was not a disqualified person. Hence, the objection to the two points should be sustained.
>
> On the basis of the above, the Defendant objects to the adjusted offense level and total offense level and submits the same should be 6. Were the Court to reject the "sporting gun" argument, then the total offense level should be 14.

These issued formed part of the basis for an all day sentencing hearing and the subsequent appeal to the Eleventh Circuit on, inter alia, the sentencing issues.

At sentencing [an excerpt of which is contained as A.7, as the sentencing encompassed almost an entire day] the Petitioner reiterated his objections and argued what he perceived to be dicta in certain decisions of this Court [*United States v. Watts*, __ U.S. __ 117 S.Ct. 633 (1997) and *United States v. Putra*, __ U.S. __ 117 S.C.t 633 (1997)]. However, the Court held the Petitioner liable for the AK-47 assault configured rifle, despite the jury's acquittal on that fact specific issue, as well as for all eight weapons.

Hence, the acquitted and or "not found" conduct increased Petitioner's guidelines range by <u>eleven levels</u>.

Petitioner brought the objections and arguments to the United States Court of Appeals for the Eleventh Circuit. In its opinion [Appendix 1], the Court held:

> Conte's fourth contention is that the court erred in sentencing him under U.S.S.G. §2k.2.1(a)(3), which provides a base offense level of 22 if the offense involved an assault-type firearm described in 26 U.S.C. §5845(a) or 18 U.S.C. §921(a)(3). Conte contends that because he was acquitted of the charge that he possessed the SLR-95, the court cannot attribute possession of that gun to him as relevant conduct. In reviewing sentencing under §2.2k1, we review the district court's findings of fact for clear error and its application of the sentencing guidelines to those facts *de novo*. *See United States v. Jameison*, 202 F.3d 1293 (11th Cir. 2000). The court did not clearly err by considering Conte's possession of the SLR-95 rifle when sentencing him, because acquitted conduct may be considered at sentencing, as long as the government proves the acquitted conduct relied upon by a preponderance of the evidence. *See United States v. Barakat*, 130 F.3d 1448, 1452 (11th Cir. 1997). It is clear the government established Conte's possession by a preponderance of the evidence.

As noted, prior to that decision, the Petitioner cited this Court's decision in *Castillo*, *supra*, as authority in support of his position, and on Petition for Rehearing or Rehearing En Banc cited to *Castillo*, *supra*, and *Apprendi v. New Jersey*, *supra*.

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE APPELLATE COURT UPHOLDING THE TRIAL COURT'S EMPLOYING THE PETITIONER'S ACQUITTAL OF A BANNED ASSAULT RIFLE AS A BASIS TO INCREASE PETITIONER'S SENTENCE

VIOLATES THE DECISIONS IN *CASTILLO V. UNITED STATES*, __ U.S. __ 120 S.CT. 2090 (2000) AND *APPRENDI V. NEW JERSEY*, __U.S.__ 120 S.Ct. 2348 (2000).

Justice Breyer, in the opening paragraph of the opinion in *Castillo, supra*, set the stage, at least as a preliminarily matter, to the issues now sought to be placed at bench:

> In this case we once again decide whether words in a federal criminal statute create offense elements (determined by a jury) or sentencing factors (determined by a judge). *See Jones v. United States*, 526 U.S. 227 (1999); *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). The statute in question, 18 U.S.C. §924(c) (1988 ed., Supp.V), prohibits the use or carrying of a "firearm" in relation to a crime of violence, and increases the penalty dramatically when the weapon used or carried is, for example, a "machinegun". We conclude that the statute uses the word "machinegun" (and similar words) to state an element of a separate offense.

Petitioner was charged with being a felon in possession of certain firearms.

The Petitioner's base offense level was set at a level 22 under U.S.S.C. §2K2.1 as the probation department found that "The instant offense involved an AK-47, with a folding stock and pistol grip, which is in violation of 18 U.S.C. §921(a)(3). The Defendant was previously convicted of Robbery 1st degree in the Supreme Court in Queens New York Indictment #2093-79".

In its initial paragraph on "the offense" the probation department, as to Count One noted the jury only found the Petitioner guilty of possessing two of the numerous weapons charged and actually on its interrogatory verdict found him not guilty of three weapons and was unable to reach a verdict as to several including the AK-47 semiautomatic [not as an

assault rifle]; it also noted the Petitioner was not guilty of possession of the banned assault rifle.

After assessing the level 22, the probation department also adjusted upward three more points finding that the Petitioner possessed all weapons charged; the jury's findings would have provided for no enhancements, and were just the AK-47 excluded only two points could have been assessed.

Thus, the acquitted AK-47 alone, still was employed to raise the Petitioner's base offense level 11 levels, that is a criminal history III from a range of 21-27 months to 57 to 71 months with no other adjustment [others did occur as noted in the introduction], and due to these the Petitioner was sentence to 63 months in custody.

The *Castillo* opinion continued:

> The question before us is whether Congress intended the statutory references to particular firearm types in §924(c)(1) to define a separate crime or simply to authorize an enhanced penalty. If the former, indictment must identify the firearm type and a jury must find that element proved beyond a reasonable doubt. If the latter, the matter need not be tried before a jury but may be left for the sentencing judge to decide. As petitioners note, our decision in *Jones* concluded, in a similar situation, that treating facts that lead to an increase in the maximum sentence as a sentencing factor would give rise to significant constitutional questions. *See Jones, supra*, at 239-252. Here, even apart from the doctrine of constitutional doubt, our consideration of §924(c)(1)'s language, structure, context, history, and such other factors as typically help courts determine a statute's objectives, leads us to conclude that the relevant words create a separate substantive crime.

The Court, in rejecting the Government's argument that, "...conceptually speaking, one can refer to the use of a

machinegun as simply a 'metho[d] of committing the underlying firearm offense'", found that the difference between carrying a pistol and a machinegun "is great both in degree and kind", and cogent to the issues at bench then stated "[I]t is not surprising that numerous gun crimes make substantive distinctions between weapons such as pistols and machineguns", and indeed cited, inter alia, to 922(v)(1), the semiautomatic assault weapon section at issue in this Petition.

After discussing further, and in particular the function of the Judge versus the jury, the Court discussed the possibility that is actually now before the Court, right down to the interrogatory verdict Petitioner's undersigned counsel presented the jury:

> At the same time, a contrary rule - one that leaves the machinegun matter to the sentencing judge - might unnecessarily produce a conflict between the judge and the jury. That is because, under our case law interpreting the statute here at issue, a jury may well have to decide which of several weapons the defendant actively used, rather than passively possessed. *See Baily*, 516 U.S. at 143. And, in such a case, the sentencing judge will not necessarily know which "firearm" supports the jury's determination. Under these circumstances, a judge's later, sentencing-related decision that the defendant used the machinegun, rather than, say, the pistol, might conflict with the jury's belief that he actively used the pistol, which factual belief underlay its firearm "use" conviction. Cf. *Alerta, supra,* at 1234-1235 (in the absence of a specific jury finding regarding the type of weapon that defendant used, it was possible that jury did not find "use" of a machinegun even though judge imposed the 30-year mandatory statutory sentence). There is no reason to think that Congress would have wanted a judge's views to prevail a case of so direct a factual conflict, particularly when the sentencing

> judge applies a lower standard of proof and when 25 additional years in prison are at stake.

The Petitioner submits that the jury found the essential elements of the matters presented to enhance the Petitioner's sentence were not proven and ordered him acquitted. The sentence, in essence and actuality sets aside the verdict.

The decision allowing that substantive acquittal to be employed as a sentencing enhancement violates *Castillo*, *supra* and the spirit of *Apprendi*, it is suggested, wherein the Court held:

> Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. With that exception, we endorse the statement of the rule set forth in the concurring opinions of [Jones]: "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt".
>
> *Apprendi* at pp. 2362, 2363

The Court's discussion in *Castillo*, *supra*, of sentencing in "use and carry" crimes, which the Petitioner submits is akin to the factors present in a felon in possession prosecution and sentencing.

The Government substantively charged the Petitioner with possessing a semiautomatic assault rifle in Count Three, and numerous other weapons in Count One. A jury concluded differently. It is respectfully submitted the trial judge and the Eleventh Circuit Court of Appeals erred in rejecting the acquittals and allowing that these acquittals could provide the basis for such a multi-level enhancement.

The Petitioner would submit that while certainly the acquitted conduct could be relevant as to where the Court could sentence a Defendant within the guideline range, [ie where in the level 14 twenty one (21) to twenty seven (27) months sentencing range the Petitioner may fall], to allow these acquittals to raise the Petitioner's sentencing range eleven (11) levels the Petitioner due process of law, and is in conflict with the decisions of this Court as addressed above.

CONCLUSION

For what has been presented, Petitioner respectfully submits a Writ of Certiorari ought issue to the United States Court of Appeals to review the decision therein.

Respectfully submitted,

FRED HADDAD
Florida Bar No. 180891

HADDAD & HESTER, P.A.
One Financial Plaza
Suite 2612
Fort Lauderdale, Florida 33394
(954) 467-6767

Attorney For Petitioner

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No.99-14306
Non-Argument Calendar

Docket No. 98-06177-CR-DTKH

UNITED STATES OF AMERICA
Plaintiff-Appellee,

versus

MICHAEL A. CONTE,
Defendant-Appellant.

Appeal from the United States District Court for
the Southern District of Florida

(July 21, 2000)

Before BIRCH, CARNES, and WILSON, Circuit Judges.

PER CURIAM:

Michael A. Conte appeals his conviction and sentence on one count of unlawful possession of one or more firearms by a felon, 18 U .S.C. §922(g)(1), and one count of unlawful possession of ammunition by a felon, 18 U.S.C. §922(g)(1).

Conte, who had a prior felony conviction, was convicted after a search of his home disclosed eight firearms including an SLR-95, modified to be an AK-47 type weapon, which is classified as a semi-automatic assault rifle. Conte attributed ownership and possession of one firearm to his wife and the others to a friend named Scott Diamond who testified at his trial. Diamond testified that he lived with Conte and his wife intermittently for three or four years and that he owned the assault rifle. Diamond claimed that he gave Conte's wife several guns as collateral for money borrowed from her. The jury found Conte guilty of possessing a Smith and Wesson .44-caliber magnum and a Colt .45 caliber pistol but reached no decision on whether Conte possessed the SLR-95. Although he was found not guilty of possessing the SLR-95, the PSI recommended a higher base offense level, attributing the SLR-95 to Conte's possession. Additionally, Conte's base offense level was enhanced two levels for obstruction of justice after the court found that Conte suborned Diamond to give perjurous testimony regarding ownership of the SLR-95 to shield him from criminal liability. Conte raises five issues on appeal. First, Conte argues that his conviction should be reversed because the district court erred by denying a motion to suppress. He argues that the court should have suppressed the warrantless searches of his garbage, there was no probable cause to support the search warrant, comments he made to agents should have been suppressed and the search exceeded the scope of the warrant.

Whether a search warrant affidavit provides sufficient facts to establish probable cause is reviewed *de novo*. *United States v. Magluta*, 198 F.3d 1265, 1271 (11th Cir. 1999). The denial of a motion to suppress evidence presents a mixed question of law and fact. The findings of fact are reviewed under the clearly erroneous standard, and the district court's

application of the law to those facts is subject to *de novo* review. The facts should be construed in the light most favorable to the party who prevailed. *United States v. Hall*, 47 F.3d 1091,1094 (11th Cir. 1995). Upon review of the record, we find no merit to Conte's' contentions, because he had no reasonable expectation of privacy in the trash that he placed in front of his house for collection. See *United States v. Hall*, 47 F.3d 1091 (11th Cir. 1995). Secondly, Conte contends that the evidence was insufficient to support the verdicts. We view the evidence in the light most favorable to the government, with all reasonable credibility choices made in the government's favor. *United States v. Majors*, 196 F.3d 1206,1210 (11th Cir. 1999). "Accepting all reasonable inferences from the evidence which supports the verdict, we will affirm the convictions if a reasonable fact finder could have reached a conclusion of guilt beyond a reasonable doubt." *Id.* Upon review of the record, we find that a jury could reasonably have concluded that Conte possessed the ability and intent to exercise dominion and control over the .44 caliber magnum and Colt .45 caliber pistol that he was convicted of possessing. Conte' s third contention is that the district court erred by charging the jury with an instruction pursuant to *Allen v. United States*, 164 U.S. 492 (1896). We do not find the Allen charge given by the district judge to be "inherently coercive" to the jury sufficient to meet the standard for reversal set forth in *United States v. Prosperi*, 201 F.3d 1335, 1341 (11th Cir. 2000).

Conte' s fourth contention is that the court erred in sentencing rum under U.S.S.G. §2k2.I(a)(3), which provides a base offense involved an assault-type firearm described in 26 U.S.C. §5845(a) or 18 U.S.C. §921(a)(3). Conte contends that because he was acquitted of the charge that he possessed the SLR-95, the court cannot attribute possession of that gun to him as relevant conduct. In reviewing sentencing under §2k2.1, we review the district court's findings of fact for clear error and its application of the sentencing guidelines to those facts *de novo*. See *United States v. Jameison*, 202 F.3d 1293, 1295 (11th Cir. 2000). The court did not clearly err by considering Conte's possession of the SLR-95 rifle when

sentencing him, because acquitted conduct may be considered at sentencing, as long as the government proves the acquitted conduct relied upon by a preponderance of the evidence. See *United States v. Barakat*, 130 F.3d 1448,1452 (11th Cir. 1997). It is clear that the government established Conte's possession by a preponderance of the evidence. Finally, Conte argues that the court erred by finding that he obstructed justice by suborning perjurous testimony. The guidelines permit a two-level enhancement upon a finding that the defendant subomed perjury. U.S.S.G. §3c1.1, comment (n. 4(b)). Conte contends that Diamond's testimony was merely inconsistent with the testimony of other witnesses, and the result of confusion or mistake, not a wilful attempt to commit perjury. In reviewing an enhancement for obstruction of justice, we review the district court's findings of fact for clear error and its application of the law to those facts *de novo*. *United States v. Garcia*, 13 F.3d 1464,1471 (11th I Cir.), cert. denied, 512 U.S. 1226 (1994). The court did not clearly err by finding that Conte obstructed justice, because the record supports that Diamond committed perjury by claiming that he, and not Conte, purchased the rifle. We give "due regard" to the sentencing court's determinations regarding the credibility of witnesses. See *United States v. Wallace*, 904 F.2d 603,605 (11th Cir. 1990). The court had the opportunity to evaluate both Diamond and the other witnesses, and did not clearly err in finding that Diamond's testimony was not credible.

AFFIRMED.

A-5

UNITED STATES COURT OF APPEALS
11TH CIRCUIT

CASE NO. 99-14306-DD

UNITED STATES OF AMERICA,
Plaintiff/Appellee,

v.

MICHAEL CONTE,
Defendant/Appellant,

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
[Daniel T. K. Hurley, Judge]

PETITION FOR REHEARING OR REHEARING EN BANC

HADDAD & HESTER, P.A.
One Financial Plaza
Suite 2612
Fort Lauderdale, Florida 33394
(954) 467-6767

United States v. Michael Conte

Case No. 99-14306-DD

CERTIFICATE OF INTERESTED PERSONS

The following persons or entities have an interest in the case before the Court:

1. Michael Conte, Appellant
2. Fred Haddad, Attorney for Appellant
3. Honorable Daniel T. K. Hurley, Judge
4. Guy Lewis, United States Attorney
5. John McMillan, Assistant United States Attorney
6. Thomas Scott, United States Attorney
7. Honorable Ann E. Vitunac, Magistrate Judge

STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court of the United States and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court: *Castillo v. United States*, __ S.Ct. __ (13 Fla. L. Weekly Fed S375) (U.S. Sup. Ct. Case No. 99-658, June 5, 2000) and *Apprendi v. New Jersey*, __ S.Ct.__ (13 Fla. L. Weekly Fed S457) (U.S. Sup. Ct. Case No. 99-478, June 26, 2000).

By:_____
Fred Haddad, Esq.
Attorney for Michael Conte

STATEMENT OF THE ISSUE ASSERTED TO MERIT EN BANC CONSIDERATION

Whether the Supreme Court's decision in *Castillo v. United States*, __ S.Ct. __ (13 Fla. L. Weekly Fed S375) (U.S. Sup. Ct. Case No. 99-658, June 5, 2000) and *Apprendi v. New Jersey*, __ S.Ct.__ (13 Fla. L. Weekly Fed S457) (U.S. Sup. Ct. Case No. 99-478, June 26, 2000) precludes a sentencing enhancement pursuant to U.S.S.G. §2k2.1(a)(3) where the Defendant has been acquitted of possessing the firearm which is the basis for the sentencing enhancement.

COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

On July 21, 2000 this Court affirmed Appellant Michael Conte's conviction and sentence on one count of unlawful possession of one or more firearms by a felon, 18 U.S.C. §922(g)(1), and one count of unlawful possession of ammunition by a felon, 18 U.S.C. §922(g)(1). Conte was sentenced to concurrent terms of 63 months imprisonment to be followed by a 3 year term of supervised release (R.1:99). Conte is currently incarcerated while prosecuting his appeal.

Count one of the indictment alleged that Conte, being a convicted felon, knowingly possessed the following firearms: 1) a Smith & Wesson .44 Magnum caliber revolver; 2) a Colt .45 caliber pistol; 3) two Colt MKIV Series 80 .45 caliber pistols; 4) a Beretta .25 caliber pistol; 5) a Mossberg 12 gauge shotgun with pistol grip; and 6) an Arsenal Model SLR-95 7.62 x 39 caliber semiautomatic rifle. The jury found Conte guilty of unlawfully possessing the Smith & Wesson .44 Magnum caliber revolver and the Colt .45 caliber pistol, but not guilty of unlawfully possessing the Smith & Wesson .38 caliber revolver, the twin Colt MKIV Series 80 .45 caliber pistols, and the Beretta .25 caliber pistol (R10:627). The jury was deadlocked as to the Mossberg 12 gauge shotgun and the Arsenal Model SLR-95 semiautomatic rifle (id).

Conte was also charged with 4 other counts.

Count two alleged Conte, a convicted felon, knowingly possessed ammunition in and affecting commerce, in violation of 18 U.S.C. §922(g)(1).

Count three alleged that Conte knowingly possessed a semiautomatic assault weapon (the Arsenal Model SLR-95), in violation of 18 U.S.C. §922(v).

Count four alleged that Conte possessed marijuana with intent to distribute, in violation of 21 U.S.C. §841(a)(1).

Count five alleged that Conte simply possessed marijuana (as a lesser-included offense of Count four), in violation of 21 U.S.C. §844(a)(R1:46).

The jury found Conte guilty on Count two, and not guilty on Counts three, four and five (id).

The District Court sentenced Conte under U.S.S.G.§2K2.1(a)(3), which provides a base offense level of 22 if the offense involved an assault-type firearm described in 26 U.S.C. §5845(a) or 18 U.S.C. §921(a)(3). The only weapon which would qualify as an assault-type firearm was the SLR-95 for which Conte was not convicted.

STATEMENT OF ANY FACTS NECESSARY TO ARGUMENT OF THE ISSUE

All facts significant to determination of the instant application are part of and contained within the Course of Proceedings and Disposition set forth *supra*.

ARGUMENT AND AUTHORITIES

1. The Supreme Court's decision in *Castillo v. United States*, __ S.Ct. __ (13 Fla. L. Weekly Fed S375) (U.S. Sup. Ct. Case No. 99-658, June 5, 2000) and *Apprendi v. New Jersey*, __ S.Ct.__ (13 Fla. L. Weekly Fed S457) (U.S. Sup. Ct. Case No. 99-478, June 26, 2000) precludes a sentencing enhancement pursuant to U.S.S.G. §2k2.1(a)(3) where the Defendant has been acquitted of possessing the firearm which is the basis for the sentencing enhancement.

The Court has affirmed the Appellant's convictions and has addressed in some aspect each of the five issues on appeal.

While the Appellant of course may well disagree with the Court on the disposition of the case, it is recognized a Petition for Rehearing or Rehearing En Banc is not a vehicle to reargue the case.

The Court, on the acquitted conduct issue, found the SLR-95 in the configuration of an assault weapon was acquitted conduct which under this Court's in *United States v. Barakat*, 130 F.3d 1448, 1452 (11 Cir. 1997), Judge Hurley was entitled to do.

As noted, the jury did not reach any decision as to whether the Defendant possessed a SLR-95 in its non assault characteristic in Count One, but certainly, on the basis of the evidence acquitted on the issue of possession of an assault weapon.

The Court's opinion does not address the recent opinion of the Supreme Court in *Castillo v. United States*, __ S.Ct. __ (13 Fla. L. Weekly Fed S375) (U.S. Sup. Ct. Case No. 99-658, June 5, 2000), as it addresses weapons set forth in §924(c)(l), wherein one finds machine guns [the issue in *Castillo*, *supra*) as well as assault weapons, the issue at bench.

The Supreme Court found that the statute, and the wording state the element of a separate aggravated crime, as opposed to a sentencing enhancement factor, as inter alia, decided by this Court in *United States v. Alborola-Rodriguez*, 153 F.3d 1269 (11 Cir. 1998).

A reading of that case, respectfully, leaves the clear impression the undersigned submits that this is a clear separate crime, non sentencing factor, and thus, the Defendant submits the acquittal ought bar the use of this for sentencing enhancement.

Again, respectfully the Appellant suggests this matter be presented the entire Court En Banc for consideration in light

of *Castillo*, or that this panel of the Court revisit its opinion on the issue.

CONCLUSION

For all the above Appellant requests that this Court grant this suggestion of En Banc determination and ultimately reverse Appellant's sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above was delivered by mail to Anne R. Schultz, Esq, Office of the United States Attorney, 99 N.E. 4th Street, Miami, Florida 33132, this ___ day of August, 2000.

HADDAD & HESTER, P.A.
One Financial Plaza,
Suite 2612
Fort Lauderdale, Florida 33394
Telephone: (954) 467-6767

BY:_____
FRED HADDAD
Florida Bar No. 180891

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-14306-DD

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

MICHAEL A. CONTE,
Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Florida

ON PETITION S FOR REHEARING AND PETITIONS FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, F.2d).

Before: BIRCH, CARNES and WILSON, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

_____
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

Case No. 98-6177-CR-Hurley/Vitunac (s)
18 USC § 922(g)(1)
18 USC § 924(a)(2)
18 USC § 922(v)(1)
18 USC § 924(a)(1)(B)
21 USC§841(a)(1)
21 USC § 844

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MICHAEL A. CONTE,

Defendant.

THE GRAND JURY CHARGES THAT:

COUNT 1

On or about September 22, 1998, in Broward County, in the Southern District of Florida, the defendant,

MICHAEL A. CONTE,

having previously been convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess one or more firearms in and affecting commerce, to wit: a Smith & Wesson .44 Magnum caliber revolver; a Colt .45 caliber pistol; a Smith & Wesson .38 caliber revolver; two (2) Colt MKIV Series 80 .45 caliber pistols; a Beretta .25

caliber pistol; a Mossberg 12 gauge shotgun with pistol grip, and an Arsenal Model SLR-95 7.62 x 39 caliber semiautomatic rifle.

All in violation of Title 18, United States Code, Sections 922(g)(1) and 924(a)(2) ,

COUNT 2

On or about September 22, 1998, in Broward County, in the Southern District of Florida, the defendant,

MICHAEL A. CONTE,

having previously been convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess one or more rounds of ammunition in and affecting commerce, to wit approximately one thousand, three-hundred and seventy (1,370) rounds of PCW brand 7.62 x 39 mm ammunition manufactured in Russia; approximately forty-seven (47) rounds of PMC and COR-BON brand .44 Magnum ammunition; approximately twenty-four (24) rounds of Winchester and Frontier brand .25 caliber ammunition; approximately eighty-seven (87) rounds of COR-BON brand .45 caliber ammunition; approximately eighty-five (85) rounds of Remington and PMC brand .38 Special ammunition; and, approximately ten (10) rounds of Remington and Winchester brand 12 gauge shotgun shell ammunition.

All in violation of Title 18, United States Code, Sections 922(g)(1) and 924(a)(2)

COUNT 3

On or about September 22, 1998, in Broward County, in the Southern District of Florida, the defendant,

MICHAEL A. CONTE,

did knowingly possess a semiautomatic assault weapon as defined under Title 18, United States Code, Section 921

(a)(30)(B), that is, an Arsenal SLR-95 7.62 x 39 mm semiautomatic rifle, serial number KO 37 1494, equipped with a folding shoulder stock, detachable magazine, and pistol grip that protrudes conspicuously beneath the action of the weapon.

In violation of Title 18, United States Code, Sections 922(v) and 924(a)(1)(B).

COUNT 4

On or about September 22, 1998, in Broward County, in the Southern District of Florida, the defendant,

MICHAEL A. CONTE,

did knowingly and intentionally possess with intent to distribute a controlled substance, that is, a mixture and substance containing a detectable amount of marijuana, a Schedule I controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1).

COUNT 5

On or about September 22, 1998, in Broward County, in the Southern District of Florida, the defendant,

MICHAEL A. CONTE,

did knowingly and intentionally possess a Schedule I controlled substance, that is, marijuana.

In violation of Title 21 1 United States Code, Section 844(a).

A TRUE BILL:

_____

FOREPERSON

_____

THOMAS E. SCOTT
UNITED STATES ATTORNEY

_____

JOHN C. McMILLAN, JR.
ASSISTANT UNITED STATES ATTORNEY

UNITED STATES COURT OF APPEAL
ELEVENTH CIRCUIT

CASE NO. 99-14306-DD
D.C. Case No. 98-6177CR-DTKH

UNITED STATES OF AMERICA,
Plaintiff/Appellee

vs.

MICHAEL A. CONTE,
Defendant/Appellant

NOTICE OF ADDITIONAL AUTHORITY IN ARGUMENT ON ASSAULT WEAPON

COMES NOW the Defendant/Appellant, Michael A. Conte, and furnishes Notice of Authority upon which he will rely in this matter as to the issue of the assault weapon "AK-47" vis a vis the acquittals on certain matters and the sentencing issues therein.

Said authority was decided by the United States Supreme Court on 5 June 2000, *Castillo v. United States*, 13 FLW Fed. S375 [a copy of the case is attached hereto] and is material, it is submitted, to the issues of the acquitted conduct sentencing on the assault weapon that occurred below.

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to Anne R. Schultz, Esq., Office of the United States Attorney, 99 N.E. 4th Street, Miami, Florida 33132, this ___ day of June, 2000.

HADDAD & HESTER, P.A.
One Financial Plaza, Suite 2612
Fort Lauderdale, Florida 33394
Tel: (954) 467-6767

By:_____
FRED HADDAD
Florida Bar No. 180891

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

PRESENTENCE INVESTIGATION REPORT
Docket No. 98-6177-CR-HURLEY(s)
Defendant No. 01
Guideline Manual: 1998

UNITED STATES OF AMERICA

v.

MICHAEL A. CONTE

Prepared for: The Honorable Daniel T.K. Hurley
U. S. District Judge

Prepared by: Sheila A. Parsons
U. S. Probation Officer
501 South Flagler Drive, Suite 400
West Palm Beach, Florida
(561) 804-6853

Assistant U. S. Attorney	**Defense Counsel**
John McMillan 500 Australian Avenue Ste. 400 West Palm Beach, Florida 33401 (561) 820-8711	Fred Haddad One Financial Plaza, Suite 2612 Ft. Lauderdale, Florida 33394 (954) 467-6767

Sentence Date: October 8, 1999, West Palm Beach, Florida

Offense: Count One: Unlawful possession of a firearm by a convicted person, 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 924(a)(2), a Class C felony

Count Two: Unlawful possession of ammunition by a convicted person, 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 924(a)(2), a Class C felony

Penalty: Counts One and Two: Zero to ten years, $250,000 fine, $100 special Assessment

Arrest Date: 10/21/98

Release Status: 10/22/98: released on $100,000 10% personal surety bond 5/19/99: remanded into federal custody

Detainers: None

Codefendants: None

Related Cases: None

Date Available for Disclosure: September 3, 1999 **Date Report Revised**:

Identifying Data

Date of Birth: 6/5/60
Age: 39
Race: White/Non-Hispanic
Sex: Male

S.S. #: 053-58-3198
FBI #: 237901X3
USM#: 54722-004
Other ID #: NY State ID# 4484427
FDLE# 02726902
FL DOC# 920850
Florida Driver's License # C530541602050

Education: GED

Dependents:	One child
Citizenship:	United States
Legal Address:	10635 NW 47th Court Coral Springs, Florida 33076 (954) 346-1997
Alias:	Lil Mike Conte, Mikey Nice
Additional SSN:	053-58-3196,053-58-3918

MANDATORY MINIMUM

PART A. THE OFFENSE

Charge(s) and Conviction(s)

1. **On May 19,1999, the defendant, Michael A. Conte, was found guilty by a jury trial of Count One of the Instant Indictment which charges him with possession of a firearm by a convicted felon as to the Smith and Wesson .44 magnum revolver and as to the Colt .45, in violation of 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 924(a)(4) and Count Two, which charges the defendant with unlawful possession of ammunition by a convicted felon, in violation of 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 924(a)(4). The jury found the defendant not guilty of Count One as to the Smith and Wesson .38 caliber revolver and the two (2) Colt MKIV Series 80 .45 caliber pistols. The jury could not reach a verdict as to Count One as to the Beretta .25 caliber pistol, the Mossberg 12 gauge shotgun with pistol grip, and the Arsenal Model SLR-95 semiautomatic rifle. The jury acquitted the defendant of Counts Three, Four, and Five.**

2. According to Pretrial Service Officer Darwin Crenshaw, the defendant was compliant with his conditions of bond pending the trial in this case. According to their records, the defendant was remanded by the Court on May 19, 1999.

The Offense Conduct

3. The following information has been secured through John McMillan, Assistant United States Attorney and investigative reports submitted by Special Agent McKean of Alcohol Tobacco and Firearms and Detective Jay Barnhouse of the Broward County Sheriff s Office

4. In June of 1998, Special Agent McKean received information that the defendant was seen carrying numerous firearms into his house, located at 10635 NW 47th Court in Coral Springs, Florida including an AK-47 type rifle. An anonymous source stated that the defendant also purchased a police type riot shotgun from a firearms dealer named Weiner, who resides at 10676 NW 48th Street in Coral Springs, Florida.

5. A check through the NCIC showed the defendant had been previously convicted of robbery in New York in 1980 and was subsequently incarcerated for 2 ½ years. He was also convicted in Florida for passing a forged/ counterfeit bill in 1990.

6. On June 22,1998, Special Agent McKean contacted the Florida Office of Executive Clemency and requested a search of their records in reference to the defendant. Special Agent McKean received a certified letter stating that on February 13, 1992, the defendant was granted restoration of his civil rights, except the one to own, possess, or use a firearm. A search of their records found that the defendant was not granted a pardon of any kind to receive, possess, or transport in commerce a firearm.

7. On September 9, 1998, Special Agent McKean and Pompano Beach Police Department, Detective Daniel Fitzpatrick pulled the defendant's trash, which was located on the curb. A review of the contents of the trash revealed three partial marijuana cigarettes, one large plastic bag with marijuana residue and two white tablets.

8. On September 16, 1998, Special Agent McKean and Detective Barnhouse conducted another trash pull and found another partial marijuana cigarette.

9. On September 22, 1998, ATF and the BSO executed a search warrant at the defendant's residence. Upon their arrival, they met with the defendant's spouse, Donna Conte, who informed them that her husband was upstairs sleeping. After being notified of the search, the defendant agreed to cooperate with authorities. He took officers around the house retrieving the following weapons:

   -Loaded Smith and Wesson model 629 .44 magnum, Serial # A WDO013 -Loaded .45 Colt Defender with laser sight, Serial # DRO3663

   -Loaded Smith and Wesson .38 caliber revolver, Serial # CCF8910

   -Two (2) Colt MKIV, .45 caliber pistols, Serial #'s SN32349 and FN04029E

   -Loaded 12 Gauge Mossberg Shotgun with laser sight, Serial # P340642

   -Loaded AK-47 Type Rifle (SLR-95) 75 round drum magazine, Serial #K0371494 -Loaded Beretta .25 caliber semi-automatic pistol, Serial # BR21923V

10. In addition to the firearms, the defendant showed them a card board box which contained the following ammunition:

    -1,000 rounds AK-47 ammunition
    -295 rounds of .44 magazine ammunition
    -15 rounds of .25 caliber ammunition
    -79 rounds of .45 caliber ammunition
    -80 rounds of .38 caliber ammunition

11. The defendant also took authorities to the study where he showed them a bag of marijuana, containing 62 grams of marijuana and an additional tupperware container

containing 3.6 grams of marijuana. In the desk was a large 0-Hause triple beam scale and a stack of cash.

Victim Impact

12. The provisions of the Victim and Witness Protection Act do not apply to these Title 18 offenses.

Adjustment for Obstruction of Justice

13. The probation officer has no information to suggest that the defendant impeded or obstructed justice.

Adjustment for Acceptance of Responsibility

14. The defendant was convicted by a jury .He has made no statements to the Probation Office acknowledging his involvement in the instant offense.

Offense Level Computation

15. Counts One and Two will be grouped, pursuant to § 3Dl.2(d) as the offense is determined largely on aggregate harm.

16. **Base Offense Level**: The guideline for 18 U.S.C. § 922(g)(I) and 924(a)(4) is found in § 2K2.1. That section provides that an offense involving unlawful receipt, possession or transportation of firearms or ammunition; prohibited transactions involving firearms or ammunition has a base offense level of 22 if the offense involved a firearm described in 26 U.S.C. § 5845(a) or 18 U.S.C. § 921(a)(30) and the defendant had one prior conviction of either a crime of violence or a controlled substance. The instant offense involved an AK-47, with folding stock and pistol grip, which is in violation of 18 U.S.C. § 921(a)(30). The defendant was previously convicted of Robbery 1st Degree in the Supreme Court in Queens, New York, Indictment #2093-79. **22**

17. **Specific Offense Characteristics**: Pursuant to § 2K2.1(b)(I)(c), if the offense involved eight to 12 firearms, increase by three levels. **+2**

18. **Victim-Related Adjustments**: None **0**

19. **Adjustment for Role in the Offense**: None **0**

20. **Adjustment for Obstruction of Justice**: None **0**

21. **Adjusted Offense Level (subtotal)**: **24**

22. **Chapter Four Enhancements**: None **0**

23. **Adjustment for Acceptance of Responsibility**: The defendant has not accepted personal responsibility for his criminal conduct. Accordingly, he is not entitled to a reduction, pursuant to § 3E1.1. **0**

24. **Total Offense Level**: **24**

PART B. THE DEFENDANT'S CRIMINAL HISTORY

Juvenile Adjudication(s)

25. None

Adult Criminal Conviction(s)

Date of Arrest	**Charge/ Agency**	**Date Sentence Imposed/ Disposition**	**Guideline/ Points**
26. 11/3/79	Ct. 1: Robbery, 1st Degree Ct. 2: Criminal Possession Weapon, 2nd Degree Ct. 3: Criminal Possession of Stolen Property, New York Police Department, Supreme Court, Queens, New York	Indictment #2093-79: 10/20/80, plead guilty to Count One, sentenced two to six years imprisonment 10/20/80: Cts 2&3 dismissed	4a1.1(a)

3

On November 3, 1979, at 1:30 P.M., the defendant along with another individual entered Conrad Jewelry Store, located at 12-27 150th Street in Whitestone, New York forcibly stole jewelry, valued in excess of $1,500 from the victim at gunpoint. Both of the defendants pointed guns at the victim. The owner of the store suffered a heart attack during the robbery and was assisted by the store clerk. Eyewitnesses took down the license plates of the defendants, whom were arrested one hour later. All the items taken in the robbery were retrieved by police. Two weapons were also retrieved. One was a .38 Special Caliber FIE Corporation Titan Model gun and the second a .25 automatic Caliber Raven Arms Semi-Automatic Pistol. Both firearms were loaded.

The defendant was released from custody on or about November 3, 1983 to parole supervision in New York. He transferred supervision of this parole on July 16,1984 to Fort Lauderdale, Florida. The defendant's parole expired on June 28, 1987.

27.	8/16/88 (age 27)	Ct. 1: License Suspended/ Revoked Ct. 2: No Valid Vehicle Registration, Tamarac Police Department, Florida	Docket No. 88-427289TC30A 10/18/88: Ct. 2: pled guilty, $32 fine and costs 10/20/88: Ct. 1: pled nolo, adj withheld, $37 fine and costs	A1.2(c)(1)
				0

The particulars to this case are not available.

28.	3/10/89 (age 28)	Uttering Forged Bills, Margate Police Department, Florida	Docket No. 89-5657CF10A: 5/3/90, pled guilty , one year probation	4A1.1(c) **1**

On March 10, 1989, officers were dispatched to the FPL office, located at 1982 North State Road 7 in Margate, Florida. Upon their arrival, a cashier advised police that the defendant gave her a counterfeit $100 bill to pay for his electric bill. The defendant admitted to police that he knew the bill was counterfeit. He informed police that he received the bill 15 years prior, since it was passed to him. The defendant was placed under arrest without incident.

The defendant's probation terminated without incident on May 2, 1991.

29.	7/22/89 (age 29)	Ct. 1: license Suspended/ Revoked Ct. 2: Possess/ Display Suspended/ Revoked/Fraud Driver's License Ct. 3: Speeding North Lauderdale Police Department, Florida	Docket No. 89-72777TC20A: 8/29/89, Cts 1&3: pled nolo, adj withheld, sentenced to Ct. 1 $35 fine and costs. Ct. 3: $25 fine and costs. Ct. 2: Dismissed	4A1.2(c)(1) <u>0</u>

The particulars to this case are not available.

30.	7/25/89 (age 29)	Loitering Building/ Prostitution, Broward County Sheriff's Office, Ft. Lauderdale, Florida	Docket No. 89-19890MM10A 12/20/89: pled nolo, adj withheld, sentence to $87 fine and costs	4A1.2(c)(1) <u>0</u>

The particulars to this case are not available.

31.	8/31/89 (age 29)	Loitering Building/ Prostitution, Broward County Sheriff's Office, Ft. Lauderdale, Florida	Docket No. 89-23617MM10A: 2/2/90, pled nolo, adj withheld $500 fine and costs	4A1.2(c)(1) 0

On the above date, the defendant was arrested at 345 East Commercial Blvd after he was previously warned and advised by law enforcement officers that the crime location was a documented place of prostitution and the defendant entered and remained in the place for the purpose of prostitution, lewdness or assignation.

Criminal History Computation

32. The defendant has four criminal history points. According to the Sentencing Table (Chapter Five, Part A), four criminal history points establishes a criminal history category of III.

Other Criminal Conduct

33. None

Date of Arrest	Charge	Agency	Disposition
9/10/98 (age 38)	Ct. 1: Possess/Purchase/ Sell/Deliver/ Manufacture Cannabis Ct. 2: Possess Drug Paraphernalia Ct. 3: Possession of a Convicted Felon	Broward Sheriff's Office Fort Lauderdale, Florida	Docket No. 98-19345CF10A: 11/5/98: Ct. 3, no information filed. & 2: pled not guilty, case pending.

The particulars to this case are included in the instant offense.

Other Arrests

35. None

PART C. OFFENDER CHARACTERISTICS

Personal and Family Data

36. The following information has been verified by the defendant's spouse, Donna Conte.

37. The defendant was born on June 5, 1960 to the union of Michael John Conte and Josephine Conte, nee: Cia. He is one of two children born to this union. The defendant's parents were married up until the father's death. Michael John Conte, Sr. passed away in January of 1999 at the age of 66 from complications with Parkinson's disease. The defendant's father resided with the defendant for approximately three months out of every year for 12 years. Prior to his demise, he was employed as a master baker with Entenmanns. His mother, Josephine Conte, age 62, resides at 682 2nd Place in Garden City, New York. She is employed at a manufacturing company.

    The defendant maintains a very close and loving relationship with his mother. He describes a loving and good upbringing.

38. The defendant's sister, Michele Conte DeClara, age 42, lives with the defendant's mother. She is presently disabled and suffers from manic depression. She does work on a part time basis at a cancer facility .The defendant maintains a close and loving relationship with his sister.

39. The defendant was born in Brooklyn, New York. The family relocated to Howard Beach when the defendant was six years of age. The defendant remained in this area until he was incarcerated in 1979. Upon his release from imprisonment, the defendant remained in New York for

several months before relocating to Broward County in 1983. For the last five years, the defendant has resided with his spouse and child at 10635 NW 47th Court in Coral Springs, Florida. A home visit was conducted, which revealed a four bedroom, two and one-half bathroom house, with a family room and screened in porch with a built in pool. The residence is situated in a quiet residential community in a middle-upper income neighborhood. The residence is very neat and nicely furnished.

40. The defendant has been married two times. His first marriage was to a Tina Bogin in Broward County on August 25, 1984. This union was dissolved on February 3, 1986 in Broward County .Verification of this union was secured.

41. The defendant married Donna Marie Conte, nee: Roberts in Coral Springs, Broward County on August 28, 1988, Marriage License # 88-1968-20. The defendant and his wife plan on re-uniting after he is released on this case. Mrs. Conte is unemployed and caring for their daughter, Christina, age 10. Mrs. Conte was diagnosed with HIV/AIDS 11 years ago and is under the care of Dr. Jose Moreno of Jackson Memorial Hospital and Nurse Practitioner Trudi Simon of the University of Miami School of Medicine. Verification of Mrs. Conte's medical condition was verified with these physicians. The defendant is very concerned about his wife's health. In addition to the normal complications she experiences from this disease, the stress of this case has also caused additional health issues. Mrs. Conte will be undergoing a liver and spleen biopsy at Jackson Memorial Hospital as she continues to have complications from her condition. Mrs. Conte reported the stress of this case has caused her a great deal of heartache in addition to added responsibilities in caring for her daughter and the household alone. She reported the added daily stress has worsened her condition and she has not felt well. The

defendant and his daughter are reportedly not HIV positive.

Physical Condition

42. The defendant is a white male, who stands six feet, one inch tall, weighs 190 pounds and has brown hair and brown eyes. He has no scars. He does have a full body tattoo. The defendant suffers from migraine headaches, asthma, ulcers, and difficulty sleeping. Prior to his arrest, he was under the care of Dr. Ronald Samess, located at 9750 NW 33rd Street, Suite 216 in Coral Springs, Florida for ongoing anxiety, migraine history , and an ulcer. The defendant was prescribed: Pepcid 20 mg for his ulcer; Stadol nose spray and Imitrex for the migraines; and Xanax for the anxiety. Verification of this treatment was secured.

Mental and Emotional Health

43. The defendant denies any history of mental or emotional problems. He reported he is having difficulty sleeping while incarcerated. He attributes this condition to the surrounding case and his wife's sickness.

Substance Abuse

44. The defendant denies any history of drug or alcohol abuse. He has never been in drug counseling and does not believe there is a need for such intervention.

Educational and Vocational Skills

45. The defendant attended John Adams High School in Queens, New York. He reported he left school after being incarcerated for a prior offense. He reported while he was in Adirondack Prison Camp, he secured his high school equivalency. Also while incarcerated, he received a certificate for small engine repair and a welding degree. Verification of this schooling was requested and is still pending.

Employment Record

46. During the presentence investigation interview, the defendant asserted he was employed with Taplin Development during the latter part of 1998. However according to Taplin Development's records, the defendant ceased his employment with them in February of 1998. According to pretrial services, the defendant reported he was supporting himself through self-employment, with no specific work history, and the lottery.

47. From August 25, 1997 through February 6, 1998, the defendant was employed at Taplin Development, located at 13651 NW 4th Street in Pembroke Pines, Florida as a construction supervisor. His responsibilities included overseeing all aspects of a construction site. He was working in this position on a full time basis, earning $800 per week. Verification of this employment was received from Karen Shelton, controller. She advised the defendant was always on time, very dependable, and did a good job.

48. During 1996 for approximately nine months, the defendant reported he was employed with J2 Communications in Atlanta, Georgia mapping out construction sites. He was earning approximately $40 to $48 per day in this position. Verification of this employment was not successful.

49. From November of 1994 through July 1,1996, the defendant was employed at Park and Pawn, located at 274 North State Road 7 in Margate, Florida. His position was a store manager. He was earning $360 per week plus quarterly bonus. Verification of this employment was secured.

50. From 1992 through 1993, the defendant was employed as a store manager with Jeffs Gun and Pawn Shop, located in Margate, Florida. Verification of this

employment was not successful, as this company is no longer in business.

51. From 1991 through 1992, the defendant was employed with Arcade Construction, which was located in Plantation, Florida. This company is no longer in existence, however contact was made with the former owner, Eric Wilson. According to Mr. Wilson, the defendant was in his employ for approximately 3 years. He was earning $800 per week. According to Mr. Wilson, the defendant was a very dependable and hard working individual. Mr. Wilson advised he would gladly re-hire the defendant for any upcoming projects he may have.

Financial Condition: Ability To Pay

52. The following information was obtained by interviewing the defendant and examining his financial records. Items marked with an asterisk (*) represent the defendant's half of assets or obligations shared jointly with his spouse.

Assets & Liabilities Summary

Cash	
*Washington Mutual (acct# 267084131)	$ 4,000
*Jefferson Pilot Services Mutual Fund Stock acct	$ 72,759
Unencumbered Assets	
*1998 Lincoln Navigator	$ 18,675
*1998 Lincoln Mark VIII	$ 5,688
*1975 Harley Davidson	$ 5,000
Equity in other Assets	
*Residence	$ 18,200
TOTAL ASSETS	**$ 124,322**

Unsecured Debts

*First Union	$ 1,040
*Mastercard (two accounts)	$ 3,050
*Republic Bank	$ 2,775
*Sound Advice	$ 750
*Bank One	$ 1,704
TOTAL UNSECURED DEBTS	**$ 8,319**
Net Worth	**$ 116,003**

Monthly Cash Flow

Income

Defendant's net income	$ 0
Spouse social security disability	$ 394
TOTAL INCOME	**$ 394**

Reported Living Expenses

Mortgage	$ 818
Electric	$ 325
Gas	$ 15
Water/Sewer	$ 45
Telephone	$ 1,500
Groceries/Supplies	$ 560
Auto Insurance	$ 216
Health Insurance	$ 78
Homeowners	$ 110
Gas	$ 160
Transportation	$ 367
Medical Expenses	$ 300
Clothing	$ 600
Cellular/ Beepers	$ 200
Minimum installment payments	$ 900
TOTAL REPORTED EXPENSES	**$ 5,894**
Net Monthly Cash Flow	**<$ 5,500>**

Analysis

53. According to the New York State Lottery Game, on February 21, 1998, the defendant claimed his share of a Jackpot prize along with his mother, Josephine Conte and his sister, Michelle Conte. The $8,000,000 was split three ways with 50% of the prize payable to Josephine Conte, 25% payable to his sister, Michelle Conte, and 25% payable to the defendant. Therefore, the defendant's share of the total winnings were $2,000,000. A copy of the certificate of term payment was secured, which showed the defendant is entitled to one initial payment on March 11, 1998 in the sum of$50,000 and 25 subsequent annual payments of$50,000 on February 15 of each year beginning February 15, 1999. Total winnings amount to $2,000,000 less withholding for Federal, State, and City taxes as applicable.

54. The Probation Office secured a terms rider agreement from Singer Asset Finance Company, located at 700 Banyan Trail, Suite 200 in Boca Raton, Florida. According to their records, they entered into an agreement with the defendant, wherein the defendant would assign five annual lottery prize payments, commencing on or about February 15, 2014 and continuing thereafter through and including February 15, 2018 in exchange for a lump sum payment of $117,000 , which was paid on or about March 10, 1999.

55. The defendant also entered into an agreement with Woodbridge Sterling Capital, located at 71 Vanderbilt Avenue in New York, New York, wherein the defendant agreed to sell 15 annual payments of the lottery commencing February 15, 1999 through February 15,2013. Contact was made with Woodbridge to secure a copy of the agreement, however a response is still pending. According to the defendant, he received approximately $575,000 in return for re-assigning these lottery payments to Woodbridge. The defendant was

required to pay the Internal Revenue Service $75,000 in taxable income.

56. The defendant still maintains the rights to the last five annual payments of the New York lottery. The defendant sold most of this winnings to the above noted companies. A good portion of the money has been spent on the following residence, vehicles, vacations, legal fees and other miscellaneous expenses.

57. The defendant and his wife purchased their current residence at 10635 NW 47th Court in Coral Springs, Florida for $147,980 in 1998 with a $30,000 down payment. The down payment was secured from his lottery winnings. The defendant and his wife assumed the mortgage from his parents in June of 1998. There is a 40 year mortgage on the residence and the monthly payments are $818 per month. The balance of the mortgage is approximately $132,000. The defendant reported the house is appraised at $300,000.

58. The defendant reported once they were in their residence, they installed a built in pool, which cost $25,000, remodeled their kitchen, which cost $10,000, and did extensive landscaping work on the property. They donated the old furniture in the residence to charity and re-decorated the dwelling, which costed approximately $25,000.

59. The defendant purchased a 1998 Navigator for $53,000 in cash. He owns a 1975 Harley Davidson Motorcycle, which is valued at $10,000. The defendant has a 1998 Mark VII LSE, which he purchased for $31,000 and the balance owed on this loan is $16,000.

60. The defendant and his wife both reported that they have been depleting their savings accounts and checking accounts with Washington Mutual and Jefferson Pilot Services to pay for their monthly household expenses and legal expenses. In addition, the defendant's wife has

on going medical expenses for her prescriptions and various treatments for her ailment.

61. According to the Internal Revenue Service, the defendant's adjusted gross income from 1993 through 1997 was $11,520, $21,262, $21,265, $15,409, and $14,904 respectively. The above listed mortgage payments and credit card accounts are consistent with the defendant's credit history report secured from Credit Bureau Inc.

62. As previously noted, the defendant still maintains the rights to five annual lottery payments, which would enable him to pay a fine within the guideline range.

PART D. SENTENCING OPTIONS

Custody

63. **Statutory Provisions**: As to Counts One and Two, the maximum ten of imprisonment is ten years, 18 U.S.C. § 922(g)(I) and 18 U.S.C. § 924(a)(2).

64. **Guideline Provisions**: Based on a total offense level of 24 and a criminal history category of III, the guideline imprisonment range is 63 to 78 months.

Supervised Release

65. Statutory Provisions: If a ten of imprisonment is imposed, the Court may impose a ten of supervised release of not more than three years, 18 U.S.C. § 3583(b)(2).

66. **Guideline Provisions**: Supervised Release is required if the Court imposes a ten of imprisonment of more than one year or when required by statute § 5D1.1(a). The guideline range for a ten of supervised release is at least two years but not more than three years, § 5D1.2(a)(2). Probation

67. **Statutory Provisions**: The defendant is eligible for a ten of not less than one nor more than five years probation

by statute, 18 U.S.C. § 3561(c)(I). Because the offense is a felony, all applicable mandatory conditions shall be imposed, 18 U.S.C. § 3563(a).

68. **Guideline Provisions**: As the applicable guideline range is in Zone D of the Sentencing Table, the defendant is not eligible for probation, § 5B1.1(a).

69. **Statutory Provisions**: The maximum fine is $250,000, per count, 18 U.S.C. § 3571. A special assessment fee of $200, $100 per count, is mandatory under 18 U.S.C. § 3013.

70. **Guideline Provisions**: The fine range for this offense is from $10,000 [§5E1.2(c)(1)] to $100,000 [§ SE1.2(c)(2)].

PART E. FACTORS THAT MAY WARRANT A DEPARTURE

71. The probation officer has identified no factors regarding the offense or defendant that would warrant a departure from the prescribed guideline range.

Respectfully submitted,

by:_____
Sheila A. Parsons
U.S. Probation Officer

Reviewed and approved:

_____
Robert J. Widmann, Supervising
U.S. Probation Officer

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

MICHAEL A. CONTE,

Defendant.

Case No. 98-6177-CR
JUDGE: DANIEL T. K. HURLEY

United States Courthouse
701 Clematis Street
West Palm Beach, Florida
October 8, 1999
10:27 a.m.

The above-entitled case came on for Sentencing before the Honorable Daniel T.K. Hurley, Federal Court Judge, pursuant to notice.

APPEARANCES:

UNITED STATES ATTORNEY'S OFFICE
by JOHN C. McMILLAN, ESQUIRE
appearing on behalf of the Plaintiff.

THE LAW OFFICE OF FRED HADDAD
by FRED HADDAD, ESQUIRE
appearing on behalf of the Defendant.

* * * * *

is the formal sentencing aspect of a trial, we need to look at the presentence investigation report first to ensure ourselves that the factual representations are accurate; and, secondly, that whatever legal conclusions have been drawn from them, that those legal conclusions are appropriate and justified; and, third, and certainly of equal importance, is the fact that the numerical calculations in the present investigation report are accurate.

With that in mind, let me turn to Mr. Haddad to see if there are any factual issues that we need to deal with, and if there are--I'm going to ask you to take me through the PSI by page, paragraph, and line just to point those out to me. I'll make a list of them, and then we will come back and deal with them one by one. And once we have completed that, we will do the same, we will look at any legal issues and see where we stand at that point.

Mr. Haddad, are there any remaining factual issues that need to be resolved?

MR. HADDAD: If it pleases the Court, we're talking about the defense conduct charged in Part A. Although it is restating the government's theory in part, I would submit to the Court that the evidence at trial adduced is consistent with what the defense conduct was. In my objections to the presentence report we did not present factual objections because - and I just want to articulate this because of the number of reasons. The preparer of the presentence report did note the various acquittals on the interrogatory --And other than the fact that we had an objection to the search and seizure, obviously that the Court managed to take, we would not articulate any objections, other than those that are consistent with the numerical objections that we are raising here.

THE COURT: Okay. But are there any factual objections that you want to make, other than the presentence investigation report?

MR. HADDAD: No, sir.

THE COURT: And let me turn to the government. Are there any factual issues the government needs to raise?

MR. McMILLAN: No, your Honor.

THE COURT: All right. Let's turn to the second category of the issues. Are there any objections to the legal conclusions that have been reached in the presentence investigation report on the part of the defense?

MR. HADDAD: If the Court could expound on what 25 it means by legal conclusions?

THE COURT: Well, any other offense or legal issues.

MR. HADDAD: If that precedes the defense level computation, then no. This is a single commuted offense, so no, I would not. If we're going to get into the numericals and enhancements, then I have objections there. I don't want to have any waivers here.

THE COURT: No, and I don't want you to either, so do you have any objections to the way the PSI is calculated?

MR. HADDAD: No objections.

THE COURT: Okay. Take me through it and we'll make --

MR. HADDAD: Okay. With the basic offense level of 22, we have raised objections to that. Let me, if I may, just digress to put some papers on the record.

As the Court knows, I'm sure I filed a motion to continue the sentencing and extension of time. Mr. Conte did not want that, because we had received a PSI some three months after his conviction. Mr. Conte and I have met a number of times and have gone through the PSI. And after he read the present

report, he felt that we raised all the issues that should be raised, so I didn't continue the sentencing, so- and I wanted that to be addressed, but, yes, we object to the PSI offense level of --

THE COURT: Okay. Help me out. Let's look at the base level. The base level is computed on page 5 at paragraph 16. So you have an objection to that calculation, do you?

MR. HADDAD: Yes, your Honor.

THE COURT: Okay.

MR. HADDAD: Our initial objection, without any of the other applicability with regressions, would be that the base offense level should be a starting level of 14. The defendant - and I guess this is going to get into some protraction --

THE COURT: Well, that's okay. But without doing that, let's --Just tell me, so I could put a tag on it. How would you describe this objection --

MR. HADDAD: I would describe it as defense to the -- My feeling is this defense level should be level 14. And based upon the level of the firearms, should be level 22, because they're collectibles.

THE COURT: That's the issue that you would like to raise?

MR. HADDAD: Specific offense characterizes -- Eight to one, where they give a two-point enhancement there. The defendant was convicted of only two firearms; a .45 and a .44.

THE COURT: Okay. So paragraph 17 is the second issue?

MR. HADDAD: Yes.

THE COURT: Okay. Hold on just a second, if you would. What is the third issue?

MR. HADDAD: Well, of course, the adjusted defense level and the total defense level.

THE COURT: Right. Let me make a suggestion, once you raise an issue, I don't think you need to keep raising it. What is the third issue that you think we need to address?

MR. HADDAD: The third issue I think we need to address is, and the defendant particularly requests this, the conviction and the three-point guideline enhancement in paragraph 26 is the prior conviction for robbery. The defendant's sentence on the robbery expired, according to his calculations, a former period of incarceration one month after the 15-year period began, one month after he commuted the 15-year term.

So we felt --We would object on the grounds that, I guess, it would be fundamental and due process, considering the rest of the conduct of his life ought not imply. And that also works hand in hand with the level 22.

THE COURT: What would be the fourth objection, if there is one?

MR. HADDAD: That would go into the guideline calculations at that point. I think that would cover the objections, your Honor.

THE COURT: All right. Let me turn to the government. Does the government have any legal issues?

MR. McMILLAN: Your Honor, I just have one legal issue, and that's that the government submits a two-point increase should be applied due to an obstruction of justice.

THE COURT: Okay. So the government is moving for obstruction of justice?

MR. McMILLAN: Yes, your Honor. And I filed a written objection in that respect, which was referenced in the second --Excuse me. I think was the first amendment to the presentation.

THE COURT: Okay. So there are four issues that we need to consider in this area.

Why don't we go down now and deal with them one by one. Why don't we start with the first issue, which is the calculation of the basic offense level, found on page 5 at paragraph 16. And let me ask you --Let's just take a minute to kind of think through the approach here. When the trial judge -- When the judge at sentencing is the same judge that presided at trial, and when the judge has an independent recollection of the evidence, I think the case law is that the judge obviously can look back at whatever evidence was presented in resolving any of these issues.

Now, if either party needs to present additional evidence, I think you certainly should have that right. So on this first issue does this --We'll do that issue by issue, obviously. I think the first thing we also need to do is try to figure out who has the burden of persuasion, because I would like to make sure that party has the first word and the last word, if you will.

And I think that when somebody files an objection like this as to the way the basic offense level had been calculated, because that obviously impacts on the sentence and makes the sentence more serious, I think the government has the burden of persuasion on that. Do you all agree to that?

MR. McMILLAN: Yes, your Honor.

THE COURT: Okay. Mr. Haddad, just to make sure we're all together, would you all take a brief second and articulate again, what is the objection you are looking for, paragraph 16.

MR. HADDAD: Yes, your Honor. The defendant is set at a level 22. Read the -- I understand (k) (2.1), it says the defense level shall be level 22 if the defense involves a firearm, and the defendant had one prior felony conviction of either a crime of violence or a controlled substance. Obviously, a robbery is considered a crime of violence, because it's from a person, a taking from a person.

The issue is the AK-47 the sole thing that makes this not a level 14 is that this weapon was asserted by the probation

department to be possessed by the defendant and an AK-47 is an assault weapon. As the Court heard the testimony, the two or three modifications that take it outside the ambit of a -- And I know I am preaching to the Court, because the Court heard the trial. The defendant was acquitted mainly of that count. And it's important to recall, he was initially indicted on one count; possession of these weapons. The government superseded and particularly charged the defendant in one count, it's Count III. I think it was with that AK--47 as an assault weapon. If it's not an assault weapon or it was just a rifle and the defendant did not know it was an assault weapon, then, of course, the level 22 did not apply. But the defendant was particularly acquitted of that count.

THE COURT: Okay. But just to kind of simplify it and understand, because I want to give you an opportunity to argue your position on it, by what you're saying is you don't believe this ought to be counted as a level 22 by counting the prior robbery conviction and the --

MR. HADDAD: Well, the robbery conviction is there, because that's what is used to make it a level 22. If it's an AK-47 --

THE COURT: You say --

MR. HADDAD: Because --Well, just one more second, if the Court will engage me. And the Court agreed, I think the government agreed that I could have that because it might be a later fact that he was not even convicted of simple possession of a weapon. The government's charge in Count I, he was convicted. Count III particularly delineated the assault weapon and he was convicted of that. So those were important factors when we get into those cases.

THE COURT: Okay. Fine. Let me turn to counsel for the government. Before we get to that, does the government wish to present any additional evidence.....

MR. McMILLAN: Your Honor, as set forth in the second addendum to the presentence investigation report, as I

believe from past experience, the Court is well aware, the standards of proof on a sentencing issue are vastly different from those at a trial. By relying on the cases of United States vs. Barkat, B-A-R-K-A-T, I found at 130 F.3d 1448 and 1452, an 11th Circuit case from 1997, as well as United States vs. Watts, 117 S.Ct. 633, the court can go and consider conduct in the sentencing decision, even acquitted conduct, which the government established by the preponderance of the evidence. We would submit to the court that issue of whether the jury found the defendant guilty or not guilty of possession of the assault weapon is not dispositive on this issue.

We believe that there is evidence beyond a preponderance of the evidence that the defendant knowingly possessed it. Now, whether the jury concluded that the defendant didn't know that it was an assault weapon or whether they ever concluded it wasn't an assault weapon, we will never know. But that issue is completely distinct for purposes of this sentencing issue from whether or not we have shown by a preponderance of the evidence that the defendant, his offensive conviction had related to the possession of a semiautomatic assault rifle.

And we believe that we have established that he had to have known, because by his own admission --And I would note that this is probably the strongest type of admission, because he is admitting the fact that he had an AK-47, and that it was in a case, knowing he was a convicted felon.

He has no motivation to lie about that, and I would submit that Special Agent McKean has no motivation as well. Under the circumstances, Judge, we believe we have sustained a preponderance of the evidence to establish that the defendant should be held responsible for that AK-47, slash, SLR-95, for purposes of this hearing. Thank you.

THE COURT: All right. Let me turn now to counsel for the defense.

MR. HADDAD: May it please the Court, let me begin by this --There is --One of the cases --There is three cases on

which I would rely; Viercat Everrary (phonetic), U.S. vs. Watts a Supreme Court case, as well as United States vs. Ross, which is an 11th Circuit case also on a different type of issue. But let me say this, there is dicta, because the Supreme Court has never reached it, as to whether or not acquitted conduct that results in a major enhancement of a sentence need not be proven by clear and convincing evidence. They didn't approach that issue, a but there is dicta that talks about that.

But we have something different here, your Honor, because we're not talking about acquitted conduct. The defendant's conduct was whether or not he was a felon in possession of a firearm. He was convicted of that. There's no question. His conduct was not acquitted. What we have is fact specific matters. Count I alleged that he was in possession of an AK-47 as part of that overall --If I can equate it to a conspiracy with multiple objects. That's what it is, a one--man conspiracy to possess with multiple objects. They took one of those particular objects --And it's only easier for me to put it this way --and made it a substance of count. That would have been Count III is the AK-47 as an assault rifle for which he was acquited. He was still convicted of the offense 24 conduct that was charged.

What these cases show and what is particularly important is that each case, starting with Ross, notes that on four --and they use the word -unfortunately --and this is in Ross. Ross and Adams did not request that the jury be provided with a special verdict to specify the objects of the conspiracy which they committed. So for that reason the court of appeals the 11th Circuit writes, we have no way of determining what they were persuaded by.

In this case, I particularly asked for a fact-specific verdict on even the simple possession of an AK-47, not an assault weapon. And Mr. McMillan elected to particularly charge in a separate indictment account, the assault weapon. I would equate this to the last scope note, as it were, of U.S. vs. Barkat, which I'm sure the Court is familiar with it, was a

case out of Judge Rutger's division on a political individual in Broward County.

And Judge Rutger wanted to, in fact, enhance this man for sophisticated method and means of a provision of crime by using an acquitted account. And the appeals court wrote, in determining whether to impose a sentence enhancement for using a sophisticated means to facilitate that tax offense for which the defendant was convicted, the district court did not consider the conduct pertaining only to the count for which the defendant was acquitted.

And watch, also, the Supreme Court decision also talks about particularized interrogatory verdicts, as opposed to a general verdict. Watch justice --It's a per curiam opinion, but in that decision too they make note that all there was was the return of a general verdict, as opposed to what we have here. In this case, only acquitted conduct --It's the same as Barkat I would submit to the Court --Only acquitted conduct on a particular issue could be used to enhance the defendant for the offensive conduct for which he has already been convicted.

Now, we have to note, and I think it's important to note here, that the jury found specifically two weapons were the defendant's. They specifically found three weapons Omar Bradley --Omar Bradley is not his name, he was a general -- But I can't remember Omar's last --testified to the Gold Cups in another weapon. Mr. Diamond testified to a weapon, the AK-47, and I think the Mossberg shotgun, and Mrs. Conte unequivocally testified to the other weapon, the .38. He was actually acquitted of the .38 and the two .45 Gold Cups.

THE COURT: But is your basic premise --The attack you make is because the jury acquitted the defendant of the crime of possessing the AK-47 or the SLR-95 that this Court cannot consider that or should not consider that in determining the offense level for the crime for which the defendant was convicted?

MR. HADDAD: Yes, sir, as to the specific the assault weapon, because what it is specifically -and the government

made it particular, just like the object of a conspiracy. They made it a particularized substantive count as to an assault weapon, and left it just as an AK-47 rifle, not an assault weapon in the main count, in Count I.

THE COURT: But, again, just trying to get to - so I make sure that I really understand what you're saying, the principle that you are advocating is that when a jury has been presented with a very specific question, the question being, "Did the government prove that Mr. Conte possessed the AK-47 or the SLR-95?" Just another name for the same weapon, and the jury says no, it is your position that the Court should not then consider that in establishing the base offense level for the crime for which Mr. Conte was found guilty?

MR. HADDAD: Yes, sir, in this particular instance, because of the way it was, I think it falls in line with where they reversed Judge Rutger in Barkat.

THE COURT: Uh-huh.

MR. HADDAD: And I think it brings it in the ambit of Ross where they say Mr. Ross and Mr. Adams, we can't help you out because you didn't ask for a specific verdict. We don't know what the jury was finding. We know the jury hung.

THE COURT: How do you deal with the principle that I think, as we stated, has risen to a level of generality that the Court can consider acquitted conduct in determining the sentencing guidelines? How do you deal with that?

MR. HADDAD: Well, it's not --It's acquitted offense conduct, Judge, that goes to the general conviction of the offense that the defendant --There, in Barkat, he was acquitted of the mail fraud, but convicted of tax evasion, and he didn't have a specific verdict, but you could use the mail fraud for part of, as they said, the sentence.

But when it became necessary to use the acquitted conduct and only that acquitted conduct for a specific

enhancement, the court said, no, you can't. And that's what the last paragraph says, you can't use that alone.

In this instance we have specific conduct acquitted where the government allowed and went forward on a particular indictment and alleged all of the conduct --This is not a situation where we have a general assertion of something. Let's say that defendant had crack cocaine and another type of cocaine and the conspiracy -he is convicted of a conspiracy in general --And that's the only way I can equate it with multiple counts, but he's acquitted of the crack cocaine. And the Court can say, yes, but he was convicted of the general conspiracy; therefore, I can use it.

In this case, the base charge was whether or not the defendant was a felon in possession, and he was. The specific was whether or not he had the AK-47 as an assault weapon. By separate count, he was acquitted. The government is asking for acquitted conduct not to be considered in toto, but to be considered as a specific enhancement of six points -is it six or eight points -for acquitted conduct.

If the court were to fax you a sentence at the top of the guidelines of something like that because it was an AK-47, that might, might be a consideration, because the court can consider all relevant conduct and I'm well aware that you can consider. And I don't mean generally the court, I mean you in particular.

THE COURT: I understand.

MR. HADDAD: But the Court can consider, certainly, arrests for which a defendant was never convicted, can consider a whole host of other things. But we're talking about the government having elected, and the defendant having requested specifics. And I think when the Court -And I know the Court has read this, and it's just the only way I can speak about it --is when you look at the distinctions drawn in Ross and in Barkat and the others, when there is a fact-specific verdict on fact-specific issues, I would submit, respectfully,

that the defendant ought not be enhanced for that. I don't think it applies.

THE COURT: All right. Thank you. Let me turn back to counsel for the government and get the government's last word on that.

MR. McMILLAN: Thank you, your Honor. Again, your Honor, we're dealing with a different standard, and even under clear and convincing evidence, and we believe we have met our burden, Special Agent McKean's testimony before the Court is unrebutted.

Furthermore, as Mr. Haddad has pointed out, they hung on Count I, so there's no dispositive decision as to whether or not the defendant possessed that weapon. That's for the Court to decide, based on the evidence.

THE COURT: Count I being the count that did what?

MR. McMILLAN: Count I being the possession of the variety of firearms, your Honor, by a convicted felon. The count which specifically charged the possession of the semiautomatic assault rifle, we can see they acquitted him on.

THE COURT: The jury found Mr. Conte not guilty on that.

MR. McMILLAN: Yes, but that assumes the jury decided, for whatever the reason --We don't know why they did that. It could be that they didn't think that Mr. Conte was the one who knowingly possessed it, or that he didn't know it was an assault weapon, or that they found it wasn1t an assault weapon.

THE COURT: Well, I mean, the point is, it could be a host of reasons for which a jury has a reasonable doubt as to anyone of the elements of that crime.

MR. McMILLAN: Certainly, your Honor.

THE COURT: What principle or what case are you relying on for the premise that the Court may consider

acquitted conduct in determining the defense level in this case?

MR. McMILLAN: The cases I cited previously, your Honor.

THE COURT: And they are?

MR. McMILLAN: That would be United States vs. Barkat, B-A-R-K-A-T, at 130 F.3d 1448 (11th Cir. 1997) and United States vs. Watts, 117 Supreme Court, and I don't have the year on that, your Honor.

THE COURT: What does the Watts case say?

MR. McMILLAN: In the Watts case, your Honor, the Supreme Court held that the conduct for which the defendant had been acquitted may be considered relevant conduct for sentencing purposes if the defendant is shown by a preponderance of the evidence to have engaged in that conduct.

THE COURT: Okay. Thank you. All right. I know that I think this has been something that has really caused many people concern. The concept that if somebody is actually put on trial for a charge and is found not guilty, it just somehow seems unfair, doesn't it, that the court can then go back and look at that conduct. But I think that is a cardinal principle in the sentencing process.

And the theory, of course, has generally been the statutes that say that the court can consider any relevant factor. And I think the way you have to approach this is that clearly Mr. Conte cannot be punished or sentenced for possessing the assault weapon, because he was found not guilty of that. But the issue becomes, can the court --Is it permissible for the Court to consider whether Mr. Conte possessed an assault weapon in determining what is the appropriate sentence for the crime for which he was found guilty.

And I think the courts uniformly say that, yes, you can do that. That is, that the principle that is put forth is that the court can consider acquitted conduct.

Now, the argument that is made here today is that 12 that would be especially unfair or wrong, because in this particular case Mr. Haddad- and frankly I think both parties agreed to this -we had an interrogatory verdict that went down the list of guns, and -- Because we realized, I think, how significant some of these determinations might be. And we asked the jury to look at the catalogue of guns that were allegedly possessed in the home, would you tell us whether the government had proven beyond a reasonable doubt that Mr. Conte possessed these? And with respect to the AK-47 or the SLR-95, which is a semiautomatic assault weapon, the jury found Mr. Conte not guilty.

Now, it is my view of the law that that finding of not guilty as a matter of law does not preclude the court from considering that issue in terms of fashioning the appropriate sentence for the crime for which Mr. Conte was found guilty.

As I said before, I know that that sort of goes against the grain. If there's a feeling that if somebody was charged and found not guilty, that the jury's determination should be the end of it, the counter argument, of course, would be that the courts have traditionally had wide latitude in looking at facts and circumstances, and that the standard of proof is different, that is, that the standard of proof is preponderance of the evidence in looking at other factors, and that the court can consider any factor that is established by a preponderance of the evidence.

Now, we will never know why the jury decided what they did. We had a wonderful jury. I think they were very diligent and very competent. But having listened to all of the testimony at trial and having considered this testimony this morning, it is my finding, as a finding of fact, that the government has indeed established by a preponderance of the evidence that Mr. Conte knowingly possessed a

semiautomatic assault weapon in the closet or off the bedroom where he was sleeping that day when he was arrested. And the statements that he gave indicating that he had used that weapon in prior times and was aware of it, all of that, in my judgment, established that Mr. Conte was aware that this weapon was in his home and that he, in fact, had at least joint if not sole possession of that weapon.

So I find that under Section 2(k) (2.1) , Subsection 3, that the government has established - and I think everybody agrees. No one's questioning Mr. Conte's prior felony conviction, so the only issue is, have they also shown that the offense involved a firearm described in Section 26 of the United States code, Section 5845, Subsection A, or 18 U.S.C. 921 (a) (30).

We're dealing here with a semiautomatic assault weapon. I find that it is, in fact, a semiautomatic assault weapon from all of the testimony that was educed at trial, and I do find that the government has established this factor by a preponderance of the evidence. So I will overrule the defendant's objection to the calculation of the base offense I level.

Let's move on, then, to the second issue that had been raised, and this deals with the robbery conviction that is set forth in --Well, forgive me.

That wasn't the second issue. The second issue is a two-level enhancement, pursuant to Section 2(k) (21) (b) (1) (c), and that is an enhancement that is appropriate if the offense involved 8 to 12 firearms, increased by three levels. Again, this is a matter that increases the sentence, so the government would have the burden of persuasion. Does the government wish to present additional evidence on this point?

MR. McMILLAN: Was that the number of guns issue, your Honor?

THE COURT: Yes.

MR. McMILLAN: Your Honor, we would rely on the testimony educed at trial with respect to this issue.

THE COURT: All right. Does the defense wish to put on additional evidence on this point?

MR. HADDAD: No, sir. I would stand by what the verdict was, and particularly adopt the testimony of Mrs. Conte and Mr. Omar.

Can I just digress for one second?

THE COURT: Yes, of course you may.

MR. HADDAD: Just protect myself on the record. When the Court found that the defendant was at a level 22, by operation of statute, that prohibits the Court from reducing it to a level 6, obviously, because - and I just want to preserve my record if I may.

THE COURT: Yes.

MR. HADDAD: If the Court would indulge me two minutes. The (b) (2) provisions say that if the defendant, other than the defendant --Subsection (a), (1), (2), or (3), which is what the Court has now found this to be possessed all of this for lawful sporting purposes or collection, it reduces to a level 6. By the court's finding, we're not all --the Court can't do that.

I would like to proffer, if I may, that I have an expert here, as I did in my sentencing memorandum, Brian Ebbs, who would have testified had the Court -- And I don't want to tie up the Court's time now, because the Court's finding concludes that, but just for purposes of the appellate court, if the appellate court were to find contrary to the defense -to the Court, I would note that I have Brian Ebbs here who is prepped to testify, excluding the AK-47 of course, all of those weapons were sporting weapons. He has documentation here of the increase of value of Colt and S&W, Smith & Wesson, because of what is occurring therein. And he's present right here in the courtroom. And also --

THE COURT: Let me stop you for a moment. Would the government accept that as a proffer ? . . . . .

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 98-6177-CR-HURLEY
MAGISTRATE VITUNAC

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

MICHAEL A. CONTE,

Defendant.

_____/

NOTICE OF INITIAL OBJECTION TO PSR, WITHOUT REVIEW WITH DEFENDANT

COMES NOW Fred Haddad, attorney for the Defendant Michael Conte and gives Notice of his Initial Objections to the Presentence Report on behalf of the Defendant, noting that, as he has set forth in his Motion for Extension of Time to Expand, Articulate and Address Objections to the Presentence Report filed on even date herewith, he has not yet had the ability to fully digest the PSR yet alone consult with the Defendant due to the minimal time, to say the least, the undersigned has had the PSR and would state:

1. The Defendant would adopt his "Motion to Expand, Articulate and Address Objections to the PSR" the same as if it were set forth in haec verba.

2. The Defendant does have numerous objections to the presentence report.

3. The Defendant objects to the base offense level of paragraph 16, that is level 22.

The Defendant submits he was acquitted of the "AK-47" possession as an assault weapon; another person testified he owned it and put it in the Defendant's house and there was no evidence to suggest the Defendant was aware it was an assault weapon [compare for both issues, *United States v. Pedro*, 999 F.2d 497 (11 Cir. 1993)].

Further, the jury, while convicting the Defendant of possession certain weapons, did not, on its interrogatory verdict, even find that the Defendant possessed a "non-barred AK-47", thus the level 22 should not apply. The proper base offense level should be level 14.

4. On that same aspect the Defendant objects to the counting of the New York Robbery for purposes of enhancement. The undersigned will address this in detail in a further pleading.

5. The Defendant further submits that pursuant to §2K2.1 the base offense level should be level 6 for section b(2) of that guideline provides:

> If the Defendant, other than a defendant subject to subsection (a)(1), (a)(2), (a)(3), (a)(4) or (a)(5), possessed all ammunition and firearms solely for lawful sporting purposes or collection, and did not unlawfully discharge or otherwise unlawfully use such firearms or ammunition, decrease the offense level determined above to level 6.

6. The Defendant submits the guns in this instance fit such a category particularly in light of the evidence at trial [the Defendant will employ as an expert witness here Brian Epps; a copy of his testimony before Judge Hoeveler in *United States v. Skubal*, Case Number 87-6034CR-HOEVLER is provided hereto for the Government since he is an expert. The testimony in Skubal related to a 1998 violation of probation, but addresses the issue herein [*United States v. Thomas Skubal*, 98-8161CR-WPD].

7. Thus, the Defendant submits the base offense level should be 6.

8. The Defendant objects to the two point increase under §2K2.1(b)(1)(c) in paragraph 17. Exactly eight firearms were seized. It is uncontroverted that the .38 Smith and Wesson belonged to Mrs. Conte, a person who is fully able to own and possess a firearm, and testified it was her gun. Hence, not even a constructive possession theory applies, *Pedro*, *supra*.

9. The two matching Gold Cup Colt MK IV pistols were also the property of someone else [Omar] who had them at the Defendant's home; he too lived there on occasion, and at the time of the search and was not a disqualified person. Hence, the objection to the two points should be sustained.

10. On the basis of the above, the Defendant objects to the adjusted offense level and total offense level and submits the same should be 6.

Were the Court to reject the "sporting gun" argument, then the total offense level should be 14.

11. The Defendant objects to the 3 criminal history points assessed from his 1979

robbery charges in the State of New York as set out in paragraph 26. This shall be articulated in a separate pleading as noted herein above.

12. The Defendant therefore objects to four criminal history points as well as a criminal history category III as set out in paragraph 32.

13. The undersigned is unable at this juncture to articulate objections to the offender characteristics portion of the presentence report and the remainder of the PSR, including the financial aspects until he has time to confer with Mr. Conte and would therefore note his Motion for Extension of Time and reserve the right to further object.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to John C. McMillan, Jr. Esq., Office of the United States Attorney, 701 Clematis Street, Room 100, West Palm Beach, Florida 33401, this _____ day of September, 1999.

HADDAD & HESTER, P.A.
One Financial Plaza, Suite 2612
Fort Lauderdale, Florida 33394
Tel: (954) 467-6767

By:_____
FRED HADDAD
Florida Bar Number 180891